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IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN W. DUKE, Mayor, and WILLIAM T. WALKER, et al, COUNCILMEN of the CITY of GUTHRIE,

Plaintiffs in Error

vs

C. W. TURNER and JAMES A. KIRKWOOD

Defendants in Error.

October Term 1906

No. 178

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

FRANK DALE and
A. G. C. BIERER.
Attorneys for Defendants in Error.

THE STATE JOURNAL CO., GUTHRIE, OKLAHOMA

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STATEMENT OF FACTS.

The defendants in error prosecuted their action in the District Court of Logan County, Oklahoma Territory, in the nature of a mandamus to compel the Mayor and City Council of the city of Guthrie to levy taxes to pay certain indebtedness created by the several subdivisions of the present city of Guthrie.

At the opening of the Territory of Oklahoma to settlement four separate city governments were established on adjacent tracts of land, and afterwards, by authority of the legislature of the Territory, were consolidated into one city, which, since the time of such consolidation, have been known as the city of Guthrie.

Under the Act of March 2, 1889, opening Oklahoma Territory to settlement, it was provided by Congress that not more than 320 acres of land could be occupied as a townsite. In order to afford people who had congregated at the city of Guthrie an opportunity to procure town lots for the purposes of occupancy, the four seperate city governments were established, each occupying 320 acres of land.

These several city governments during their separate existence contracted various debts, and on Dec. 25, 1890, after the consolidation, the legislature of the Territory of Oklahoma passed an act entitled, "An Act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie," wherein it was provided among other things that the District Judge of Logan County should appoint three persons to act as a commission to inquire into and pass upon all claims and demands theretofore issued by the city governments mentioned in the caption of said Act; that the owners and holders of script warrants or other evidence of indebtedness theretofore issued by said city governments should present their claims to the commissioners, and if the said commissioners should find that said claims were of the character mentioned in said act, the same should be allowed and thereafter certified to the District Court for approval or disapproval, and that all claims allowed and approved by the District Judge should be certified to the Mayor and Council of the village of Guthrie, now the city of Guthrie; and such Mayor and Council were directed to is-

sue warrants upon the village and people of the village to the holders and owners of said claims, to be paid by installments in one, two, three, four and five years, and to bear interest at the rate of 6 per cent. per annum from the date of the allowance of the commission.

And it was further provided in said Act that:—

"And said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, Mayors and School Boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them." Wilson's Digest Laws of Oklahoma, 1903. Vol. 1. p. 260-261.

The defendants in error became, by assignment and purchase, the owners of seventeen warrants, of which the numbers, amounts, dates of issue and date when due, are set forth on page 41 of the record.

The petition for mandamus filed in the trial court was made up of seventeen separate causes of action and was so filed on the 23rd day of July, 1903. In the record the plaintiffs in error have set forth the first and last causes of action, and they appear on pages 11 to 16 inclusive.

The Judge of the District Court issued an alternative writ which, in substance, appears at pages 16 to 18 inclusive, of the record, and to this alternative writ the city answered, First, denying generally all of the material allegations of the alternative writ except that the defendants were the Mayor and Councilmen of the city of Guthrie, and that due demand had been made upon the Mayor and Council to levy a tax to pay the warrants, which facts are duly admitted, and Second, alleging that the total indebtedness of the city of Guthrie, exclusive of

the warrants sued upon, was in excess of four per cent. of the value of the taxable property within the city, and claiming exemption under the Act of Congress of June 30, 1886, being Section 4, Chapter 818, Vol. 24, U. S. Statutes at Large, page 177. For a third return and answer it was alleged that during the year 1895 one W. H. Gray, was the Receiver of the National Bank of Guthrie, which was then the owner of the warrants sued upon; that during the summer of 1895 said Gray made demand upon the then Mayor and Council of the city of Guthrie to levy a tax for the payment of the warrants; that upon their failure so to do, said Gray brought an action for mandamus in the District Court of Logan County, which action was prosecuted to the Supreme Court of the Territory, where the judgment of the trial court in said former action was reversed and the cause remanded; and that the last action was not commenced within one year after the reversal and dismissal of the former action. This answer and return will be found on pages 18 to 22 inclusive, of the record.

Upon the trial of the cause no proof was offered under the second defense set forth by the city relating to the indebtedness of said city, and after the plaintiff therein had proved the ownership of the warrants and introduced the same in evidence, the following admission appears:—

"It is admitted by the defendant, the city of Guthrie, and the defendants in this case, that prior to the time of bringing this action, no levy has been made for the payment or discharge of the sums due, as shown by the face of the warrants, and that no money is now or has been with the treasurer of the city of Guthrie, or in the treasury of The City of Guthrie, for the discharge of any of the obligations created under the terms of the warrants offered in evidence." See pages 38 and 39 of the record.

At the same time it was admitted by the plaintiff in the case that:—

"The W. H. Gray, Receiver, mentioned in the third para-

graph of defendants' answer, was the legally appointed, qualified and acting Receiver of the National Bank of Guthrie, and the successor of Harper S. Cunningham, to whom the warrants sued on and described in the Alternative Writ herein were made payable, and as such Receiver, said W. H. Gray was the holder of said warrants, and said W. H. Gray during the summer of 1895 made demand upon the then Mayor and Council of said The City of Guthrie, in said Logan County, to levy a tax for the payment of said warrants, pursuant to the provisions of Article 1, Chapter 14, of the Statutes of Oklahoma of 1890.

It is further admitted that the allegations and facts pleaded and alleged in the fourth answer or return of defendants to the Alternative Writ, are true, as therein pleaded."

It will be observed by an examination of the record, (p. 36) that the case of the Territory of Oklahoma ex rel W. H. Gray, Receiver, etc., vs. Robert Martin, Mayor, etc., was on the 28th day of June, 1901, revived in the name of C. W. Turner and James A. Kirkwood, defendants in error here; and upon page 37 it will be noticed that on the same day and after the revival of the action the same was dismissed without prejudice to a new or further action.

The trial court rendered judgment for the plaintiff upon all warrants, together with interest, from which judgment an appeal was taken to the Supreme Court of the Territory, where the judgment of the lower court was duly affirmed. The opinion by the Supreme Court will be found in the record at pages 47 to 55 inclusive.

The only question presented to the Supreme Court of the Territory and considered by such court is the one arising on the statute of limitations; the trial court as well as the Supreme Court holding that the statute of limitations could not be interposed by the city as a bar to a recovery for the reason that the officers neglected and failed to levy a tax for the payment of

the sums due, as shown by the face of the warrants, or to provide a fund for the discharge of the obligations.

At the trial of the cause and in the Supreme Court of the Territory it was contended by the plaintiffs in error here that the statute of limitations might be interposed to prevent a recovery and the only question which can be considered in this appeal under the matters set forth in the record is the correctness of the ruling of the trial court and the decision of the Supreme Court growing out of the contention of counsel for the city that the statute of limitations governs and precludes the defendants in error from a recovery. It was insisted in brief of counsel before the Supreme Court of the Territory, and we presume will be urged here, that because a suit in mandamus is in the nature of an action, the three year statute of limitations is applicable to the case at bar, and that the right to bring the action accrued at the time suit was instituted by the Receiver Gray.

It is our contention that the city of Guthrie having failed through its municipal officers to levy a tax or to create a fund for the payment of the obligation, plaintiffs in error cannot maintain as a defense the statute of limitations.

ARGUMENT.

It will be observed that the act of the legislature of the Territory of Dec. 25, 1890, provides that the Mayor and Council *shall* levy a tax upon the property of the residents of the various villages named as Guthrie, East Guthrie, West Guthrie and Capitol Hill, according to the amount of indebtedness, and that each of the cities *shall* be liable for and taxable under the act for the amount of the indebtedness created by them.

This law is in the nature of a special act for the purpose of affording relief to the various claimants whose claims should be allowed by the commission and approved by the Judge of the District Court, and no provision is made in this act for any defense of the character under consideration. That the law in question is a valid act has been settled by the decision in the case of *The Guthrie National Bank vs. The City of Guthrie*, 173 U. S., 528; and in view of our Code, Section 388, code of civil procedure, 1059, Vol. 2, Wilson's Digest, which provides that a civil action may be dismissed by the plaintiff at any time before trial without prejudice to another right of action. Turner and Kirkwood at the time of the commencement of this action in mandamus stood in the attitude of persons who theretofore had instituted no action to recover upon the warrants which they held against the city.

We contend, however, that, under the great weight of authority applicable to the case under consideration, and particularly in view of the decisions of our own Supreme Court, no error was committed by the rendition of the judgment in favor of Turner and Kirkwood, and its affirmance in the Supreme Court of our Territory.

We start out with the proposition that, in a case of this character, where the only question involved is that of the statute of limitations, the Supreme Court of the United States will accept the construction placed upon such statute by the Supre-

me Court of the Territory, even if the higher court might be of the opinion that probably the construction given by the courts of the Territory was not such as would be placed upon such statute if the matter were before the Supreme Court of the United States to be determined independently of such construction. It seems to be the settled rule of the Supreme Court of the United States that such court will follow the construction placed upon local statutes of limitations by the various state and Territorial courts.

This principle is concisely stated in *Great Western Telegraph Co. vs. Purdy*, 162 U. S., 329-339, and is as follows:—

"The limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. *McElmoyle* v. *Cohen*, 13 Pet. 312; *Bauserman* v. *Blunt*, 147 U. S. 647; *Metcalf* v. *Watertown*, 153 U. S. 671; *Balkan* v. *Woodstock Iron Co.*, 154 U. S. 177."

In *Balkan vs. Woodstock Iron Co.*, 154 U. S., 177-187, it is said:—

"The conclusion of the Alabama court is assailed here on the ground that it is unsound in law. While, of course, as the statutes of the State of Alabama allow two actions in ejectment, the decree of the Supreme Court of Alabama does not constitute 'the thing adjudged' in the case before us, we think the rule under which we follow state statutes of limitation and the construction of such statutes by the state courts compels us to treat the doctrine here announced as conclusive of the present case, so far as this court is concerned. The whole subject was very fully reviewed by this court in the case of *Bauserman v. Blunt*, 147 U. S., 647."

Numerous authorities are cited in this case, and we deem it unnecessary to pursue this subject further, except to suggest that the same rule applicable to state courts with refer-

ence to statutes of limitation will, under the principle laid down in *Hornbuckle vs. Toombs,* 18 Wall. 648, apply with equal force to the decisions of the Territorial courts upon matters of this character.

Our own Supreme Court has had occasion to deal specifically with the question under consideration in the case of *Board of County Commissioners of Greer County vs. Clark & Courts,* 12 Okla. 197, and the rule is there laid down without qualification that a municipality which issues evidence of indebtedness of the character in question cannot invoke the statute of limitations without first pleading and proving that it has provided a fund for the payment of the indebtedness. Quoting from the opinion in that case:—

"In our opinion where a warrant is issued by the officers of a municipal or quasi municipal corporation, and the creditor accepts the same relying on the ordinary modes of taxation to pay said obligation, the corporation cannot be heard to say, upon an action to enforce the payment thereof, that it is barred by the statute of limitations without first pleading and proving that it has provided a fund for the payment of such indebtedness."

Applying the rule laid down in *Great Western Telegraph Co. vs. Purdy,* supra, it would seem that a decision of the Supreme Court of Oklahoma has settled the rule for this Territory upon the question under consideration, to the effect that in cases of the character here under consideration, the statute of limitations will not be permitted as a defense. We have, however, as we think, the great weight of authority in support of our contention, from numerous states dealing with this matter, and particularly the decisive authority of the Supreme Court of the United States.

The principle which estops a municipal corporation from invoking the aid of the statute of limitations rests upon the fact that such municipal corporation has been guilty of some act of

negligence which would make it inequitable, in the absence of an express statute, to permit such municipality to avail itself of that character of a defense. Under the law it was the duty of the city to make provision by appropriate levies for the payment of these warrants as the same might from time to time fall due. The statute specifically directed such levies, and the city by its own failure to perform those statutory duties ought not to be permitted to create the defense which they here seek to interpose. The courts are not inclined to favor a defense of this character, where such a defense is created by the failure upon the part of public officers to perform a statutory duty, and thereby give countenance to action upon the part of public officers in violation of a law which such officers have taken an oath to support. We call attention briefly to a number of cases other than the decisions of our own Supreme Court, which we think unequivocally support the position we are here contending for.

In *Lincoln County vs. Luning*, 133 U. S., 529, we find a case where the legislature had provided for the creation of a special fund by the debtor out of which the creditor was to be paid, and such case is clearly in point with the one we are here considering, because, while that liability was originally created by contract, as was the indebtedness of the old provisional governments of the city of Guthrie, yet by reason of default, the legislature of Nevada had undertaken to provide a method by which the indebtedness should be liquidated, passed a law providing for the registration of overdue coupons, and imposed upon the treasurer the duty of thereafter paying such coupons as the money came into his possession applicable thereto. The coupons were presented for payment and not paid, no money coming into the treasury applicable thereto. The statute of limitations was pleaded as a bar to a recovery in the action. By the general limitation of the law of the state, some of its cou-

pons were barred, but in passing on this question the court said:—

"But when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the limitation until he shows that the fund has been provided."

The language herein quoted is especially applicable to the case under consideration. The legislature of the Territory of Oklahoma provided how the indebtedness of the old provisional governments of the city of Guthrie should be determined and liquidated; and in the act provided that the present city of Guthrie should, through its municipal officers, levy taxes upon the different subdivisions which had created obligations, and that such levies so made should create funds for the payment of the warrants issued. This it is admitted the officers of the city of Guthrie have failed entirely to do, and now they seek to interpose their own wrongful acts and negligence as a defense, under the guise of the statute of limitations.

We think, in principle, the case of *Lincoln County vs. Luning* is also supported in *King Iron Bridge Manufacturing Co. vs. Otoe County*, 124 U. S., 459.

Robertson vs. Blaine County, 90 Fed., 63, is a case wherein it is held that a county cannot plead the statute of limitations to an action to enforce an obligation payable from a particular fund without first showing that it has provided such fund, and this case cites and follows *Lincoln County vs. Luning*, supra.

This principle, as applied to the right of municipal corporations to plead the statute of limitations, is sustained in the following cases:—

Grayson vs. *Latham*, 84 Ala. 546;
Apache County vs. *Barth*, 6 Ariz. 13;
Justices vs. *Orr*, 12 Ga. 137;

Gasquet vs. *City Schools*, 45 La. Ann. 342;
Forbes vs. *Board of County Commissioners of Grand County*, 23 Colo. 344, 47 Pac. 388.

Kansas has had occasion to pass upon this same question in a number of cases.

In *School District No. 5 vs. The First National Bank of Wabash*, 66 Pac. (Kan.) 630, quoting from the opinion:—

"Statutes of limitation give the defendant a right to resist the payment of a demand based upon some act of negligence or omission of the plaintiff. But in the case at bar the defendant would found its right to defeat the claim sued on by asserting its own negligence. It has never set the machinery of the law in motion to collect the money required to meet its obligations. It has remained since the debt was contracted in a continued state of insolvency, created by its own act. We need not do more than to quote the language of Brewer, J., in *Lincoln Co. v. Luning*, 133 U. S., 532, 10 Sup. Ct. 363, 364, 33 L. Ed. 766, 767; * * *"

To the same effect is *Miller* vs. *Haskell County*, 66 Pac. (Kan) 1084; *Hubble* vs. *South Hutchinson*, 64 Kan. 645; *Leach* vs. *Wilson County*, 62 Tex. 331.

It was insisted in the brief of counsel for the city in the Supreme Court of our Territory that because of the fact that a mandamus action had been instituted by W. H. Gray, Receiver, then holder of the warrants, in 1895, at which time the right of action had accrued, therefore the statute of limitations commenced to run at the time of the institution of such action.

We fail to see the force of this suggestion. It is true that the right of action existed in the warrant-holder prior to the time of the institution of the action now in consideration, but this fact cannot affect the right of the warrant holders to maintain the present suit provided we are right in our contention

that the statute of limitations does not begin to run until such time as the city has provided a fund for the payment of the indebtedness. As heretofore shown, our statute permits a suit to be dismissed without prejudice to a new cause of action. The suit instituted by Gray, the Receiver, was so dismissed, and the present warrant-holders stand in the attitude of persons who have never brought any action to enforce their claims, and while the right of action existed in 1895 as to some of the warrants, yet we think that such fact has no bearing upon the case under consideration, because it is immaterial how many suits may be instituted upon the same cause of action, if the right to maintain the last one so instituted is not barred by the statute of limitations.

If A. has a right of action upon a contract which is not barred by the statute of limitations for a period of ten years, and commences an action within one year after the right accrues, and if the law gives to A. the right to dismiss that action without prejudice to a new one, and A. so exercises the right given to him by the statute, and nine years after commencing the first action begins another one upon the same cause, the second action is not prejudiced by the bringing of the first, because the second one is still brought within the period of time fixed by the statute. So, too, in the present case, if the statute of limitations has no application until such time as the city has performed its duty under the law, then the right to maintain the suit exists until such time as the city has placed itself in a position where it may properly interpose the statute of limitations; and if the Supreme Court of this Territory is right in the law as announced, and the statute of limitations does not begin to run until the municipality has created a fund to pay the warrant indebtedness, it is wholly immaterial how many actions are brought in the case, for the limitation does not begin to run until the municipality has performed its duty in the first instance.

In conclusion we suggest that we are unable to distinguish this case in any manner from the case of *Lincoln County vs. Luning,* 133 U. S., 529, and we further suggest that our own Supreme Court, having followed the case of *Lincoln County vs. Luning, supra,* and this being a matter of decision upon a local statute and clearly within the principle of *Great Western Telegraph Co. vs. Purdy, supra,* we believe on principle, as well as authority, that the decision of the Supreme Court of the Territory of Oklahoma should be affirmed.

Respectfully submitted.

FRANK DALE and
A. G. C. BIERER.
Attorneys for Defendants in Error.